Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	
	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266 MM Docket No. 93-215
	)	
	)	
Adoption of Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
	)	
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

COMMENTS

The American Cable Association ("ACA") hereby submits these comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioning proceedings[1] seeking

[1] *Modernization of Media Regulation Initiative; Revisions to Cable Television Rate Regulations; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Adoption of Uniform Accounting System for the Provision of Regulated Cable Service*

comment on changes to the Commission's rules related to cable rate regulation. ACA supports the Commission's efforts to update its rate regulation rules.

First, ACA urges the Commission to adopt its proposal to exempt small cable systems owned by small cable companies from rate regulation.[2] Indeed, we do not see how the Commission could do otherwise. Rate regulation – applicable today to only a handful of larger operators and systems,[3] and then only because the relevant test has yet to be updated to account for online competition[4] – provides no meaningful benefit in today's highly competitive market. For this reason, the Commission should eliminate the rules even if they were not burdensome at all. Yet if rate regulation were imposed on small cable systems, the harm would be signficant—so much so that the mere threat of such imposition causes harm. The case for elimination is thus strong.

The case is even stronger in light of Congress's determination that the Commission has authority to provide relief for smaller cable systems—authority the Commission has acknowledged for more than twenty years. ACA believes such relief should be provided, *at a minimum*, to systems serving 15,000 or fewer subs that are

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Cable Pricing Flexibility, Further Notice of Proposed Rulemaking and Report and Order, FCC 18-148 (rel. Oct. 23, 2018) ("*FNPRM*").

[2] *Id.* ¶ 18.

[3] *See FNPRM* ¶ 7 ("[Existing rules are unnecessary, especially] given how few cable operators are actually subject to rate regulation today. The costs of complying with our current regime, including the cost of retaining experts that are familiar with it, place a great burden on the few industry members and franchising authorities that remain engaged in rate regulation. It also appears unnecessary for the Commission to administer such a complex regime for such a small number of regulatees."); *Amendment of the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574 (2015) ("*Effective Competition Order*") (creating presumption of effective competition);

[4] *See* Establishment of "Permit-but-Disclose" Ex Parte Procedures for Charter Communications, Inc.'s Petition for Determination of Effective Competition, DA No. 18-1154, MB Docket No. 18-283 (rel. Nov. 13, 2018), https://docs.fcc.gov/public/attachments/DA-18-1154A1.pdf (raising question of whether effective competition test applies to OTT providers).

owned by cable companies serving 400,000 or fewer subscribers. Indeed, higher thresholds may be appropriate.

ACA also believes that the Commission should simplify processes and forms for larger cable systems.[5] As the Commission describes in its FNPRM, the burdens on larger cable systems are no longer justifiable, and the Commission should take whatever steps it lawfully can to reduce them.

I. The Commission Should Eliminate Rate Regulation for Small Cable Systems.

A. Rate Regulation Provides No Benefits in a Competitive Market.

Congress established the existing rate regulation regime when cable faced little direct competition.[6] Yet the past thirty years have seen "significant changes that have . . . occurred in the marketplace, legal landscape, and technology,"[7] – some of which stems from decisions by Congress and the Commission to promote competition. In light of these developments, the benefit of rate regulation – *i.e.*, artificially constraining basic service tier prices to "competitive" levels – that might have existed at one time no longer exists today.

[5] *FNPRM* ¶¶ 11 *et seq.*

[6] Cable Communications Policy Act of 1984 (codified as 47 U.S.C. Subchapter V); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992). The Telecommunications Act of 1996 amended Section 623 of the Communications Act of 1934 to provide that after March 31, 1999, rates for the CPST would not be subject to regulation. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4)).

[7] *FNPRM* ¶ 9.

ACA members know this because of the new competition enjoyed by their *own* subscribers.[8] Each and every one of ACA's 700 small and mid-sized cable operator members faces robust competition. All compete against two DBS providers, one of which offers local channels in every market,[9] the other of which does so in nearly every market.[10] Many ACA members also face competition from another cable or IPTV provider operating in their market. Today, moreover, ACA members face competition from numerous over-the-top ("OTT") video services, such as DIRECTV Now, YouTube TV, Hulu, and Sling. These providers offer similar packages of programming—nearly all of which contain local programming in a growing number of markets.[11] They offer prices comparable to if not lower than those offered by cable operators.[12] Competition from OTT providers is no longer merely a *prospective* threat. Cable and satellite providers lost a combined total of 2.8 million video subscribers in the first three quarters of 2018,

[8] *Communications Marketplace Report*, FCC No. 18-181, ¶¶ 48 *et seq.* (rel. Dec. 26, 2018) ("*Marketplace Report*") (describing competition).

[9] 17 U.S.C. § 119(g) (requiring DISH Network to provide local signals in every local market in order to re-obtain its statutory license to provide distant signals).

[10] FCC, *Television Broadcast Stations on Satellite*, Media Bureau (Feb. 19, 2016) https://www.fcc.gov/media/television-broadcast-stations-satellite ("As of December 2015, DISH Network provides local-into-local service in all 210 television markets and DIRECTV offers this service in 198 markets.").

[11] Phil Nickinson, *What local channels can you get on DirecTV Now?*, Cordcutters (Oct. 19, 2018), https://www.cordcutters.com/what-local-channels-can-you-get-directv-now (listing local channels available on DIRECTV Now); *Local channels on DirecTV Now, Fubo TV, Hulu, PlayStation Vue, Sling TV and YouTube TV compared [by CNET]* (last accessed Jan. 28, 2019), https://docs.google.com/spreadsheets/d/1noUpNBYZNBflhjjfELB0kULjx5sZ2rQ3aBnbDZ5gMI/edit?usp=sharing (CNET chart listing local channels for DirecTV Now vs. Fubo TV vs. Hulu with Live TV vs. PlayStation Vue vs. Sling TV vs. YouTube TV as of August, 2018).

[12] *Marketplace Report* ¶¶ 84-85 (discussing pricing competition among OTT providers).

many of them to OTT providers.[13] Constrained by such competition, cable operators simply cannot charge above-market prices for Basic Service Tier programming.

To the contrary, the overwhelming problem with Basic rates is that *broadcasters themselves* seek to increase retransmission consent costs beyond sustainable levels.[14] While ACA has suggested a number of ways in which government intervention can help moderate increases in retransmission consent costs, it is hard to see how cable rate regulation can do so.

B. Imposition of Rate Regulation Would Impose Substantial Burdens on Small Cable Operators.

If, as we believe, rate regulation would provide no benefits to small cable operator subscribers, then the Commission should not maintain them. It *certainly* should not maintain them if they would impose administrative burdens on operators that are subject to them. And for small cable operators, the administrative burdens of being rate regulated would be significant. Indeed, the mere possibility that they might be imposed is problematic.

We begin by discussing the burdens imposed on those few larger systems subject to rate regulation. Compliance with rate regulation requires considerable time

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[13] In the first three quarters of 2018, traditional pay-TV services lost a total of roughly 2.8 million subscribers, while multichannel over-the-top platforms that recreate the traditional pay-TV experience, such as DIRECTV NOW, Sling TV, Hulu with Live TV, YouTube TV, and PlayStation Vue, gained 2.1 million subscribers. Ian Olgeirson, Tony Lenoir and Neil Barbour*, Q3'18 multichannel video subscriptions fall despite virtual services lift*, Kagan (Nov. 12, 2018), https://platform.mi.spglobal.com/web/client?auth=inherit&newdomainredirect=1&#news/article?id=47764955&KeyProductLinkType=6 (subscription required); *see also* Mike Snider, *Cord cutting accelerates even worse than first thought, with 1.2 million defections in Q3*, USA TODAY (Nov. 14, 2018), https://www.usatoday.com/story/tech/nation-now/2018/11/14/cord-cutting-pace-accelerates-1-2-million-drop-pay-tv-3rd-quarter/1997716002/.

[14] *See, e.g.*, Comments of the American Cable Association, MB Docket No. 15-216 (Dec. 1, 2015); Comments of the American Television Alliance, MB Docket No. 15-216 (Dec. 1, 2015).

and effort. As Chairman Pai noted, "the FCC's rate regulations are mind-numbingly complex, filling up 52 pages in the Code of Federal Regulations."[15] Under existing rate rules, regulated cable operators typically file an annual Form 1240 and an annual Form 1205. The forms themselves are difficult to decipher, and the data demanded extensive.

The Form 1205, for example, requires the completion of multiple schedules and worksheets, including detailed information regarding capital costs and operating expenses associated with the installation and maintenance of equipment, as well as the capital costs of different categories of leased customer equipment. The calculations are horrifically complicated. The operator must supply extensive cost information, including gross book value, accumulated depreciation, deferred taxes, and the permissible rate of return, including adjustments to reflect interest deductibility. Moreover, the operator must provide detailed figures on the number and types of different customer premises equipment, and the total and average labor hours spent on various installation and maintenance activities related to that equipment.

The Form 1240 is equally indecipherable. Here, for example, are the instructions for setting permissible maximum rates.

> **Segmenting the Maximum Permitted Rate**
>
> In setting your maximum permitted rates, Form 1240 accomplishes several tasks. First, it calculates two maximum permitted rates and, because these rates are averages of changes over a period of time, one rate cannot naturally be derived from the other. In addition, because of the flexible timing of the process, the rates on the current filing cannot naturally be derived from the rates on the previous filing. So, while one Form 1210 builds off of the previous Form 1210, Form 1240 cannot do this. Instead, with each filing of a

[15] *FNPRM*, Statement of Chairman Ajit Pai.

> Form 1240, you strip away most of the additions you have made to the maximum permitted rate under the annual adjustment process to arrive what is called the base rate. The base rate is then used to calculate both the True-Up Period rate and the Projected Period rate.[16]

The burden of deciphering and complying with even this subsection of the instructions seems obvious. Moreover, there are a host of associated modules and worksheets ensuring that properly completing the Form 1240 is a formidable task. Literally hundreds of discrete data points must be entered to complete a single Form 1240.

Of course, the burdens would be higher yet for a newly rate-regulated cable system, such as if (for example) an effective competition presumption were overcome for an operator never before regulated. Any such system would have to begin the regulatory process by "building" current Form 1240 rates after supplying a full array of customer rate and service offerings, as well as internal cost data, from 1992 and comparing that old data with current data. One can only imagine how hard it is to find 1992 data, or what format it might be stored in. In such circumstances, the estimates that completing the requisite forms would take only 35 hours seem questionable.[17]

Were such burdens applied to small cable operators already struggling to compete in today's video marketplace, the effect would be even greater. Of course,

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[16] To facilitate this process, Form 1240 breaks the additions made to the maximum permitted rate into seven segments. Those are: the Headend Upgrade Segment, External Costs Segment, Caps Method Segment, Markup Method Segment, Channel Residual Segment, True-up Segment, and Inflation Segment. Federal Communications Commission, *Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services* (last accessed Jan. 28, 2019), https://transition.fcc.gov/Forms/Form1240/1240inst.pdf.

[17] *Id.* (instructions for Form 1240 will require 15 hours); Federal Communications Commission, *FCC Form 1205 Instructions for Determining Costs of Regulated Cable Equipment and Installation* (last accessed Jan. 28, 2019), https://transition.fcc.gov/Forms/Form1205/1205inst.pdf (instructions for Form 1205 will require 20 hours).

smaller cable operators can avail themselves of a simpler "cost of service" rate regulation form.[18] Yet even this form is complicated, requiring an operator to present specific information regarding its net rate base and operating expenses for programming and equipment – figures that are not easily derived. Moreover, one of the major benefits that the Form 1230 was intended to convey – the presumption that any Form 1230 rate below $1.24 per channel is reasonable[19] – is of little use to a growing number of small cable systems. A reasonable per channel rate is intended to cover total operating expenses, including wages, salaries, programming, advertising, electricity, maintenance, depreciation, amortization and all other relevant costs,[20] but at present a growing number of stations elect retransmission consent, and the fees for such stations are high and increasing. S&P Global Market Intelligence reports that all cable operators, including those large and small, will pay $2.01 per subscriber per month for stations that elect retransmission consent in 2019.[21] ACA members report that even this number significantly understimates the actual amounts they will pay this year. Accordingly, the $1.24 per channel presumption for all channels carried on the Basic Service Tier is increasingly insufficient for the smallest systems.

[18] In 1995, the Commission adopted a "simplified cost-of-service procedure" (Form 1230) specifically for systems with fewer than 15,000 subscribers that are owned by cable companies with fewer than 400,000 subscribers. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, ¶¶ 456-65 (1993); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd. 7393 (1995) ("*Small Systems Order*").

[19] *Small Systems Order* ¶ 58.

[20] *Id.*

[21] S&P Global Market Intelligence Tech, Media & Telecom, *Economics of Broadcast TV Retransmission Revenue, Document ID: 85660881*, spglobal.com (Aug. 9, 2018).

Small cable operators, moreover, are particularly ill-equiped to deal with the kind of burdens described above. Not typically being public companies, small providers are unlikely to have the detailed books and records (not to mention staff expertise) necessary to easily complete the required filings. They would almost certainly have to hire expensive outside consultants to compile the supporting data and prepare the required forms for filing.

Indeed, even today, small cable operators are harmed by the mere *possibility* that they might be regulated. ACA has provided extensive evidence about the threat of future *broadband* regulation having depressed small providers' investments in their networks.[22] The same dynamics are in play in this context. As the risk of rate regulation increases in an already fragile economic environment for provision of cable services, ACA members will be less inclined to invest in deploying their video services in new areas, and in some cases may elect to invest less (or stop providing video services altogether) in existing areas.

C. The Commission Possesses Legal Authority to Grant Relief.

Providing small cable systems owned by small cable companies with an exemption from rate regulation is consistent with Section 623 of the Communications Act. As the Commission has previously found,[23] the 1992 Cable Act specifically contemplated relief for smaller systems. Section 623(i) requires the Commission to

[22] *See* Comments of the American Cable Association at 23-28, WC Docket No. 17-108 (filed July 17, 2017) (describing how the threat of future rate regulation that accompanied the reclassification broadband Internet access as a Title II telecommunications services was a key driver in small providers' decisions to cut back or delay network upgrades and expansions).

[23] *See Small Systems Order*.

"reduce the administrative burdens and costs of compliance" for the very smallest cable systems.[24] Section 623(m) exempts a larger subset of smaller cable operators from regulation of the basic service tier.[25] More broadly, the Statement of Policy contained in the statute in which Congress expressed its intent, inter alia, to:

> (1) promote the availability to the public of a diversity of views and information through cable television ...;
> (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;
> (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems....[26]

The Commission has relied on this authority to grant a wide range of relief to small systems with up to 15,000 subscribers, who "generally face many of the same challenges that systems of 1,000 or fewer subscribers do in providing cable service."[27] Of course, such systems would face even greater challenges were rate regulation imposed upon them today. We are thus aware of no factual basis to disturb this conclusion, nor of a reasonable basis upon which the Commission could revisit it.[28] Given the overall state of video competition, the Commission should extend a blanket exemption to small operators and systems from any form of rate regulation.

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[24] 47 U.S.C. § 543(i).

[25] 47 U.S.C. § 543(m). ("(1) In general Subsections (a), (b), and (c) do not apply to a small cable operator with respect to— (A) cable programming services, or (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.").

[26] 1992 Cable Act, 47 U.S.C. § 521, Congressional Findings and Policy for Pub. L. 102-385 § 2(b)(1)–(3).

[27] *Small Systems Order* ¶ 29.

[28] *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

D. Higher Subscriber Thresholds May be Appropriate.

The Commission proposes providing relief to systems serving 15,000 or fewer subscribers owned by cable companies serving 400,000 or fewer subscribers.[29] This appears based on the subscriber thresholds for use of the simplified rate-regulation forms, described above.[30] In this case, however, higher subscriber thresholds may be appropriate. Again, in today's competitive market, rate regulation provides no benefits *for subscribers of any cable system, regardless of size.* In such circumstances, the Commission should consider providing more extensive relief even to mid-sized cable systems.

II. The Commission Should Simplify the Process and Forms for Larger Cable Operators.

While the Commission should provide extensive relief to small cable operators, it should also consider minimizing the rate regulation burdens on large operators subject to the rules by making fundamental changes to the existing rate regulation framework[31] and to individual forms.[32] The Commission itself describes why this is necessary: "It seems unnecessary, out of step with current circumstances, and overly burdensome on the cable industry and franchising authorities to retain a complex set of rules that were written in a different era."[33] As a policy matter, we would prefer to see these regulations eliminated for *all* cable operators because we believe the burden of potential

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[29] *FNPRM* ¶ 18.

[30] *See generally Small Systems Order*.

[31] *See FNPRM* ¶¶ 10-15.

[32] *Id.* ¶¶ 20-34.

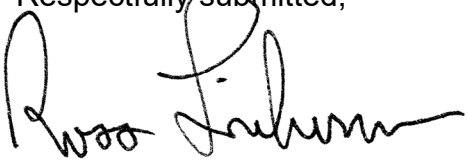
[33] *Id.* ¶ 7.

compliance far outweighs any benefits. To the extent the Commission concludes it may not do so consistent with Section 623 of the Act, we urge it to take all of the deregulatory steps it concludes lie within its authority. Wherever possible, it should update and streamline regulatory processes to minimize administrative burdens.

* * *

Because cable rate regulation is no longer needed, and the costs of complying with the rules far outweigh the benefits, the Commission should exercise its legal authority to adopt an exemption for small cable systems that are owned by small cable companies, and should take whatever steps it can with respect to larger systems to minimize the burdens associated with rate regulation.

Respectfully submitted,



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